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SUPREME COURT OF THE UNITED STATES
FALL TERM, 1973

NO. 72-1580

ROBERT E. PORTH,
Petition,

vs.

WARDEN OF THE STATE PENITENTIARY
OF NORTH CAROLINA,
Respondent,

REPLY BRIEF

ROBERT E. PORTH
Petitioner prose
In propria personam
Central Prison
835 West Morgan Street
Raleigh, N.C. 27603

September 24, 1973

SUPREME COURT OF THE UNITED STATES

FALL TERM, 1973

NO. 72-1580

ROBERT E. PORTH,

Petitioner,

vs.

WARDEN OF THE STATE PENITENTIARY OF NORTH CAROLINA,

Respondent.

REPLY BRIEF

NOW COMES, Robert E. Porth, the petitioner in this cause of action, filing this REPLY BRIEF in support of the grantment of certiorari in this cause by the Court, and the grantment of the relief sought, and in support of such petition would show unto the Court:

OPINION BELOW

The petitioner adopts by reference thereto the entries already made by Petitioner and Counsel for Respondent as to this matter.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 19 of the Rules of the Supreme Court of the United States, rather than 28 U.S.C.A., 1257(3), as erroneously stated by counsel for respondent in the Brief Respondent.

QUESTIONS PRESENTED

Petitioner reinstates the Questions Presented For Review as set out in his Petition for Writ of Certiorari, as he is not satisfied with the rewording of same by respondent:

I. DOES THE ISSUANCE OF A CERTIFICATE OF PROBABLE CAUSE BY THE DISTRICT COURT, ENTITLE A PETITION ON APPEAL TO A UNITED STATES COURT OF APPEALS, TO MORE THAN A SUMMARY DISMISSAL OF HIS APPEAL, BASED UPON THE REASONS STATED BY THE DISTRICT COURT IN ITS DENIAL OF HABEAS RELIEF?

II. WAS ROBERT E. PORTH DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE TRIAL JUDGE DID NOT EXERCISE CARE SUFFICIENT TO PROTECT PORTH'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL, IN PARTICULAR, THE FEDERAL COURTS HAVE REPEATEDLY HELD THAT THE TRIAL JUDGE IS UNDER AN AFFIRMATIVE DUTY TO SHIELD THE ACCUSED FROM THE PREJUDICIAL EFFECTS OF MASSIVE, ADVERSE PUBLICITY?

III. WAS ROBERT E. PORTH DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE STATE'S PRIMARY WITNESS TESTIFIED WHILE IN FEAR OF BEING ARRESTED, AND HAS SUBSEQUENTLY REPUDIATED HER TESTIMONY?

IV. WAS ROBERT E. PORTH DENIED A FAIR AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER WAS ERRONEOUSLY ADMITTED INTO EVIDENCE?

V. WAS ROBERT E. PORTH DENIED A FAIR AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT THE TRIAL COURT PERMITTED TESTIMONY CONCERNING AN AUTOPSY WHICH WAS PERFORMED ON MRS. PORTH FIVE MONTHS AFTER HER DEATH WITHOUT A SHOWING AS TO TREATMENT OF THE BODY IN THE INTERIM?

VI. WAS ROBERT E. PORTH ENTITLED TO A HEARING ON HIS PETITION FOR HABEAS CORPUS?

CONSTITUTIONAL PROVISIONS INVOLVED

That this cause concerns the application of Section 1 of the Fourteenth Amendment to the U.S. Constitution, as set out by the petitioner in his petition for writ of certiorari, filed in this cause.

STATEMENT OF THE CASE

The petitioner reiterates herein as if fully set out by reference thereto the STATEMENT OF THE CASE, as set out by him in the Petition for Writ of Certiorari filed in this cause and states that the petitioner seeks in this Court a reversal of the Memorandum Decision of the U.S. Court of Appeals of January 24, 1973, and the Order denying petition for rehearing entered in this cause on March 5, 1973, by the United States Court of Appeals for the Fourth Circuit, rather than the Order of the United States District Court for the Middle District of N.C. of October 26, 1971, as stated by counsel for respondent.

REASONS FOR THE GRANTMENT OF WRIT OF CERTIORARI BY THIS COURT

The petitioner in this Reply Brief, will briefly point out the merits of his various contentions.

ARGUMENT NO. I

THE ISSUANCE OF THE CERTIFICATE OF PROBABLE CAUSE BY THE DISTRICT COURT BELOW, ENTITLED THE PETITIONER ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, TO MORE THAN THE SUMMARY DENIAL AND SUMMARY DISMISSAL GIVEN TO HIM BY THAT COURT BASED UPON THE REASONS STATED BY THE DISTRICT COURT IN ITS DENIAL OF HABEAS RELIEF.

It is clear that a Certificate of Probable Cause to appeal was issued and granted by the District Court below on December 29, 1971, See A-9, Attached to Petition for Writ of Certiorari filed in this Court.

It is clear that the U.S. Court of Appeals did not properly consider the appeal, in that its MEMORANDUM DECISION of January 24, 1973 states:

> "Accordingly, although leave to proceed in forma pauperis is granted, a certificate of probable cause to appeal is denied."

It is clear that this appeal was not an informa pauperis appeal, as the petitioner has paid his way through all the courts that he has entered in his search for justice. And it is clear that a certificate of probable cause to appeal has already been granted, and that the petitioner was entitled to more than the summary dismissal.

It is clear that the petitioner was not given a proper review on appeal in this matter in the United States Court of Appeals for the Fourth Circuit.

It is clear that this summary denial and dismissal of the appeal was not a determination on the merits, as the petitioner was entitled to an appeal of right after the issuance of the Certificate of probable cause to appeal.

ARGUMENT NO. II

ROBERT E. PORTH WAS DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE TRIAL JUDGE DID NOT EXERCISE CARE SUFFICIENT TO PROTECT PORTH'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL, IN PARTICULAR, THE FEDERAL COURTS HAVE REPEATEDLY HELD THAT THE TRIAL JUDGE IS UNDER AN AFFIRMATIVE DUTY TO SHIELD THE ACCUSED FROM THE PREJUDICIAL EFFECTS OF MASSIVE, ADVERSE PUBLICITY.

Excessive publicity, (over 100 articles) either good or bad leads to excessive speculation and makes any such case the subject of major interest and discussion. Too many preconceived ideas must carry over into the jury room.

It is clear that Counsel for Respondent, stopped his reporting of the news coverage, just prior to the trial and during the trial.

It is clear that the petitioner sought a change of venue, but was denied, that this denial of the change of venue, after the massive, adverse publicity generated in this case, the denial of this motion for change of venue, was in itself a denial to this petitioner of his constitutional right to a fair and impartial trial.

The test of time reveals that Mr. Porth was tried, not in an atmosphere of probable unfairness, but rather actual unfairness. The trial judge should have recognized the *probable* unfairness which Mr. Porth faced. A change of venue or a special venire would have protected Mr. Porth from this inherent unfairness.

ARGUMENT NO. III

ROBERT E. PORTH WAS DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE STATE'S

PRIMARY WITNESS TESTIFIED WHILE IN FEAR OF BEING ARRESTED, AND HAS SUBSEQUENTLY REPUDIATED HER TESTIMONY.

Most of Nancy's testimony was lies, largely due to the fact of coercion and threats of the prosecution. The fact that she skipped the country to get away from the jurisdiction of the Court at the time of the post conviction hearing is indicative of her guilt of perjury and testifying to false evidence at the trial had in this matter, at the February 1966, Term of Forsyth County Court.

It is submitted, that the petitioner was entitled to a fair trial by the State, and the pressure used against this witness to compel testimony against the petitioner, is a clear indication that the petitioner was not given his constitutional right of a fair trial in this cause.

It is submitted, that a conviction obtained by the use of perjury and false evidence must fall of its own weight.

It is clear that Nancy's conscience was bothering her about the perjury and false evidence that she gave in the trial of this matter in February, 1966, in that the Affidavit was sworn to and subscribed by her while the case was on appeal to the Supreme Court of North Carolina on August 21, 1966.

It is not how or who is to blame for the denial of the fair trial in this matter, it is simply that the petitioner is entitled to relief for its denial to him.

ARGUMENT NO. IV

ROBERT E. PORTH WAS DENIED A FAIR TRIAL AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER WAS ERRONEOUSLY ADMITTED INTO EVIDENCE.

That the admission of this evidence, was made more

prejudicial by the pre-trial publicity in the news media concerning this matter.

That it is clear that the trial judge did not instruct the jury to disregard this improper and incompetent evidence, which was brought out by the Solicitor in questioning of the Petitioner's son.

As pointed out in the action, the first opinion of the North Carolina Supreme Court in regards to this question was recalled and another was issued.

That this is just another of the instances which are clearly pointed out and shown that the petitioner was denied his constitutional right to a fair and impartial trial at the February 1966 Term of Forsyth County Superior Court.

Petitioner has never been afforded the opportunity for a constitutionally fair trial, free from the prejudice of such incompetent evidence. This constitutional guaranty should be extended to him immediately by awarding him a new trial.

It is submitted that the modification of the opinion of the Supreme Court of North Carolina had a substantial effect on the fate of petitioner, and that the prejudicial questions complained of herein are not constitutionally acceptable.

ARGUMENT NO. V

ROBERT E. PORTH WAS DENIED A FAIR AND IMPARTIAL TRIAL BY REASONS OF THE FACT THAT THE TRIAL COURT PERMITTED TESTIMONY CONCERNING AN AUTOPSY WHICH WAS PERFORMED ON MRS. PORTH FIVE MONTHS AFTER HER DEATH WITHOUT A SHOWING AS TO TREATMENT OF THE BODY IN THE INTERIM.

The ensuing second autopsy in this matter, reveals

that bruises thought at the time of the first autopsy to be meaningless, were found to have caused the death. It is submitted to the Court that a great portion of the said bruises were the results of a previous bout with poison ivy by Mrs. Porth.

That x-rays of the second autopsy revealed additional bone damages, proving rough handling of the body in the interim.

On second autopsy, pathologist failed to determine a single cause of death, so concluded that death was due to multiple bruises. These same bruises were considered superficial by Dr. Jenaro S. Asteinza, who performed the first autopsy. He felt they didn't even warrant being incised. How and why were they recorded as the major cause of death after the second autopsy.

Reference is made to the 5 months interval between the 1st and 2nd autopsy. That the first autopsy did not establish a known cause of death. But, though cause of death remained undetermined, the petitioner was charged and indicted for 1st degree murder. It is clear that the second autopsy was arranged and set up to try and find cause for the arrest, and charges placed against the petitioner.

It is apparent that the findings of the first autopsy were supported by an examination by a qualified pathologist, and that the exhuming of the body and the second autopsy being conducted without the jury being informed of the changes in the body due to the rough handling and elapsed time was fundamentally unfair.

That the x-rays taken conclusively show that additional bone damage was recorded and occurred during the interim of the 1st and 2nd autopsy. And that if the handling was so rough that bones were damaged, then it is clear that no scientific data could have been established as to the effects of such bruises that had been held superficial by the examining pathologist at the first autopsy.

That in every other line of evidence the State is required to show the chain of evidence that is presented, why is not the burden on the State to show such in this case.

It is submitted that the lettering of and permission given to the State to offer evidence concerning the second autopsy performed some five months after the first one, without requiring the State to show the treatment of the body in the interim, was such that denied to the petitioner his constitutional right to a fair and impartial trial.

ARGUMENT NO. VI

ROBERT E. PORTH IS ENTITLED TO A HEARING ON HIS PETITION FOR HABEAS CORPUS.

The petitioner was not given a fair, factual hearing in the state courts. The state courts failed to take into full account the full impact of the massive pretrial publicity, particularly the media publication of information which was incompetent as evidence. Moreover, the petitioner has made a substantial allegation of newly discovered evidence. It is respectfully submitted that petitioner should be awarded a hearing on his petition for a writ of habeas corpus. 28 U.S.C. Section 2254(d)(2),(3),(6),(7) and (8).

CONCLUSION

For the reasons stated herein, in the record, and the petition for writ of certiorari filed in this cause, it is submitted that the petitioner is entitled to relief in this Court. That it is apparent that he was denied his constitutional right to a fair trial secured to him by the United States Constitution in Section 1 of the Fourteenth Amendment to the United States Constitution. That he has been denied proper review of his con-

stitutional issues in the state courts and the District Court and the United States Court of Appeals below. That a determination of this cause on the merits shows that relief is warranted, if not on one single issue, then the cumulative effect of them only lead to one fair conclusion, and that he was denied his right secured by the United States Constitution to a fair and impartial trial.

WHEREFORE, for the herein stated reasons, as supported by the records, and petition for certiorari, it is respectfully MOVED and PRAYED, that this Court will grant and issue in the behalf of the petitioner a writ of certiorari in such form and manner as the Court may direct to the end, that the MEMORANDUM DECISION and ORDER entered in this cause in the United States Court of Appeals for the Fourth Circuit on January 24, 1973 and March 5, 1973, respectively, may be reviewed and the judgments of the United States Court of Appeals for the Fourth Circuit in these matters, be reversed, and this Court remand this case to the United States Court of Appeals for the Fourth Circuit, or the District Court for the Middle District of North Carolina, as decided by this Court, for the grantment of the relief, that this Court finds that the petitioner is entitled to upon a determination of the merits of this cause, i.e. new trial, appeal re-instatement, plenary hearing in District Court.

Respectfully submitted,
ROBERT E. PORTH
Petitioner pro se
In propria persona

September 24, 1973

Central Prison
835 West Morgan Street
Raleigh, North Carolina 27603

STATE OF NORTH CAROLINA)
)ss.:**VERIFICATION**
COUNTY OF WAKE)

ROBERT E. PORTH, being first duly sworn on oath, represents that he has subscribed to the above and states that the information contained therein is true and correct to the best of his knowledge and belief.

ROBERT E. PORTH
Affiant

SWORN TO AND SUBSCRIBED
BEFORE ME, THIS —— DAY
OF SEPTEMBER, 1973.

_____

NOTARY PUBLIC

_____

CERTIFICATE OF SERVICE

SUPREME COURT OF THE UNITED STATES

NO. 72-1580, October Term, 1973

ROBERT E. PORTH,

Petitioner,

vs.

WARDEN OF THE STATE PENITENTIARY OF NORTH CAROLINA,

Respondent.

I HEREBY CERTIFY, that on this 24th day of September, 1973, three copies of REPLY BRIEF, were placed into an envelope addressed to counsel of record for respondent, Hon. Richard N. League, Assistant Attorney General, N.C. Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602 That the said addressed envelope containing the three copies of this action, were placed into the United States Mail, for postage prepaid delivery to the said Counsel of Record for the respondent by certified mail, return receipt requested on this date. I further certify that all parties required to be served have been served.

ROBERT E. PORTH
Petitioner pro se
In propria personam

Central Prison
835 West Morgan Street
Raleigh, N.C. 27603